Breaking the Code of Deference: Judicial Review of Private Prisons

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Confronted with lawsuits alleging substandard prison conditions and court orders to relieve overcrowding, many state and local officials are now studying the possibilities of contracting out the operation of prisons to for-profit firms. In a few states, private corporations already operate jails, and several others are considering enabling legislation in response to this trend. Such privatization appears to be an attractive policy for ameliorating the poor state of the American correctional system, reducing its cost to the public, and providing more efficient management.

Little effort, however, has been made to examine the constitutional implications of delegating correctional authority to private parties.[1] After briefly surveying the development of private prisons, this Note traces the marked reluctance of the courts to scrutinize the discretionary practices and decisions of prison officials. It then examines the longstanding hostility that courts have shown toward standardless delegations of discretionary power to private, for-profit entities and argues that, in the context of private prisons, continued deference is incompatible with this hostility, since deferential review would render such facilities especially susceptible to unreviewed and unremedied abuse. The Note concludes that privatization will require not only strict contractual standards, but, more importantly, greater judicial willingness to review prison practices and to guarantee the rights of prisoners.

I. The Development of Private Prisons

The concept of private prisons is not new. In England, private individuals often operated jails for profit.[2] In the early years of the United States,

1. This lack of study has led the American Bar Association to call for a moratorium on prison privatization "until the complex constitutional, statutory and contractual issues are fully developed and resolved." *See* N. Y. Times, Feb. 12, 1986, at A28, col. 3.

2. *See* L. Orland, Prisons: Houses of Darkness 17 (1975) (poor conditions "attributable in large part to the fact that the wardens, keepers, and gaolers (who either purchased their positions or were rewarded their posts for services rendered) were unpaid by the Crown and, consequently, exacted fees and charges from the inmates"); *see also* American Correctional Ass'n, The American Prison: From the Beginning . . . . 3 (1983) (beginning with Assize of Clarendon's authorization of jail construction in 1166 A.D., jailkeepers extorted fines from inmates and sold them food at exorbitant prices); *cf.* V. Fox, Introduction to Corrections 384–85 (2d ed. 1977) (discussing historical role of private individuals and groups in corrections).

this tradition continued, with private jailers fulfilling a task that the young nation was initially unable to perform.[3] By the end of the nineteenth century, however, incarceration was increasingly seen as an exclusively governmental function, and the role of private parties in corrections began to decline.[4] In the Arkansas prison cases, federal judicial intervention eliminated the last great bastion of private involvement in the key disciplinary aspects of prison life, totally restructuring a penal system largely because of the profiteering and abuse that the contracting out of inmate labor had spawned.[5]

Until recently, private involvement in corrections was limited to the operation of juvenile justice facilities, halfway houses, work-release programs, and alien detention centers and to the provision of secondary services[6] such as health care, food preparation, educational and vocational programs, and staff training.[7] Faced, however, with rampant overcrowding,[8] bargaining difficulties with guards' unions,[9] rejection of prison con-

3. *See, e.g.*, B. MCKELVEY, AMERICAN PRISONS: A HISTORY OF GOOD INTENTIONS 94, 118, 199–203 (1977) (describing leasing of convicts to private parties); Sellin, *Correction in Historical Perspective*, in CORRECTIONAL INSTITUTIONS 12 (R. Carter, D. Glaser & L. Wilkins eds. 1972) ("[O]ne of the chief elements of punishment has remained the financial exploitation of the prisoner's manpower. . . . [T]he system of contract labor for the benefit of private employers . . . remained in many states until twenty-five years ago.").

4. *See, e.g.*, B. MCKELVEY, *supra* note 3, at 111, 126–29 (discussing anti-contract agitation and growth of state control). Nonetheless, judicial ambivalence on the subject did continue. *Compare* People *ex rel.* Walsh v. Board of Comm'rs, 397 Ill. 293, 301, 74 N.E.2d 503, 508 (1947) (duty to administer county jail exclusively sherriff's) *and* Jones Hollow Ware Co. v. Crane, 134 Md. 103, 106 A. 274 (1919) (reserving "custody and maintenance" of convicts to state) *with* Fox v. Mohawk & Hudson River Humane Soc'y, 165 N.Y. 517, 524–25, 59 N.E. 353, 355 (1901) (dictum) (legislature may not delegate to private entities power over "life, liberty, and property of the citizens" *except* in areas of eminent domain and "management and control of reformatory institutions").

5. *See* NATIONAL INST. OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMIN., U.S. DEP'T OF JUSTICE, AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS 35–36, 38 (1977) [hereinafter AFTER DECISION] (discussing "widescale private use" of convict labor in Arkansas); *see also* cases cited *infra* note 19. Some states now have statutes expressly prohibiting financial interest in convict labor. *E.g.*, NEB. REV. STAT. §§ 83-443 to -444 (1981) ("No warden . . . guard . . . or other employee . . . shall be in any manner whatever financially interested in the work or profit of the labor of any convict . . . .").

6. This Note focuses on core correctional functions, which involve the discretionary, adjudicative, and disciplinary practices of prison personnel, rather than on secondary or collateral functions, which involve the provision of some individual good or service.

7. NATIONAL INST. OF JUSTICE, THE PRIVATIZATION OF CORRECTIONS 4–7 (1984); Camp & Camp, *Correctional Privatization in Perspective*, 65 PRISON J. 14 (Autumn-Winter 1985) (nationwide overview of private sector involvement in prison services); Mullen, *Corrections and the Private Sector*, 65 PRISON J. 1 (Autumn-Winter 1985).

8. Approximately 250,000 prisoners are housed in city and county jails. N.Y. Times, Nov. 24, 1985, at E5, col. 1 (citing U.S. Government statistics). Between 1975 and 1984, the state and federal prison population increased from 240,593 (111 per 100,000 population) to 463,866 (188 per 100,000 population). *Id.* It has now swelled to over half a million. Applebome, *New Prisoners Are Barred by Crowded Texas Prisons*, N.Y. Times, Jan. 17, 1987, at 8, col. 1. Thirty-two states are under court order to relieve unconstitutional conditions, primarily overcrowding; challenges to conditions of confinement are pending in 10 other states. *Id.* Seventeen percent of the nation's counties are under similar court order. Elvin, *A Civil Liberties View of Private Prisons*, 65 PRISON J. 48 (Autumn-Winter 1985). Some states have been forced to release inmates early in order to comply with court

struction bonds by the electorate,[10] and the rising costs of confinement in general,[11] state officials[12] have grown sympathetic to the argument that private enterprise can operate correctional institutions better and more cheaply than can government.[13] Private for-profit firms now operate approximately two dozen major facilities,[14] including at least three medium or maximum security adult correctional institutions.[15] Moreover, despite

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mandated occupancy limits. Applebome, *Texas, in Emergency, To Free 185 from Crowded Prisons,* N.Y. Times, Feb. 28, 1987, at 10, col. 5.

9. *See* J. JACOBS, NEW PERSPECTIVES ON PRISONS AND IMPRISONMENT 142-59 (1983) (discussing collective bargaining and labor disputes in New York state prisons).

10. *See* N.Y. Times, Feb. 17, 1985, at 29, col. 1 (rejection of prison construction bonds and tax increases one of factors leading states to seek privatization of overcrowded prison systems); *Corrections and the Private Sector: A National Forum,* 1985 NAT'L INST. OF JUSTICE PROC. 11 [hereinafter PROCEEDINGS] ("only 40 to 50 percent of the initiatives for general obligation bonds receive voter approval").

11. *See* Immarigeon, *Private Prisons, Private Programs, and Their Implications for Reducing Reliance on Imprisonment in the United States,* 65 PRISON J. 60, 61-64 (Autumn-Winter 1985) (discussing "fiscal crisis" of American prisons).

12. The overwhelming majority of prisons in the United States are state facilities, and the overwhelming majority of inmates are state prisoners. Even local jails and detention centers hold more prisoners than the federal penal system. H. ALLEN & C. SIMONSEN, CORRECTIONS IN AMERICA: AN INTRODUCTION 523 (2d ed. 1978). Because most local facilities house only misdemeanants and those awaiting felony adjudication, *id.* at 442, and because state facilities involve a far greater range of disciplinary and quasi-adjudicative functions than do local facilities, this Note concentrates primarily on state penal institutions.

13. *See, e.g.,* Address by Senator Mitch McConnell, National Forum on Corrections and the Private Sector (Feb. 22, 1985), *reprinted in* PROCEEDINGS, *supra* note 10, at 83-84; N.Y. Times, Aug. 9, 1984, at 4, col. 3 (reporting speech of Senator Alfonse M. D'Amato advocating prison privatization); *Prisons for Profit,* Wall St. J., Feb. 5, 1987, at 20, col. 1 (discussing prospective benefits of prison privatization).

Appeals for private sector involvement in functions traditionally considered "public" in nature have increased in frequency and intensity, with advocates of privatization expressing confidence that the pursuit of private gain and the rolling back of state activities further the interests of the larger social order. The Reagan Administration, for example, has identified 11,000 government activities to be performed by independent contractors when economically feasible. N.Y. Times, Feb. 1, 1986, at 54, col. 1. Recently, with official sanction, a number of private firms have assumed prosecutorial and adjudicative roles previously reserved to the government. *See* Thompson, *Who's Minding the Store?,* STUDENT LAW., Feb. 1986, at 24 (surveying use of private investigatory firms and private attorneys as de facto law enforcers for copyright infringement and other crimes); N.Y. Times, Feb. 24, 1986, at 64 (describing private judicial system in California); *Public Service, Private Profits,* TIME, Feb. 10, 1986, at 64 (discussing "Judicate," private dispute settlement firm); N.Y. Times, Dec. 8, 1985, at 59, col. 1 (describing use of lawyers as part-time magistrates).

14. N.Y. Times, Feb. 19, 1985, at A15, col. 1. Nashville-based Corrections Corporation of America (CCA), the largest of the prison privatization firms, claims that it now owns or leases nine facilities containing a total of 1646 beds. CORRECTIONS CORP. OF AM., PROSPECTUS 1, 4 (Sept. 1986) [hereinafter PROSPECTUS].

15. CCA contracts with Hamilton County, Tennessee to operate the 325-bed Silverdale Adult Detention Center, a facility that houses a considerable number of prisoners serving long terms for felonies. N.Y. Times, May 11, 1985, at A14, col. 1. CCA also operates the county jail and work camp in Bay County, Florida. PROSPECTUS, *supra* note 14, at 14. Buckingham Security Services, Ltd. operates the county jail in Butler, Pennsylvania. Pittsburgh Press, Oct. 13, 1985, at A12, col. 1. In 1984, Buckingham proposed to build and operate "Riverhaven," a maximum security prison in Beaver, Pennsylvania, for 720 protective custody inmates from a number of states, and the company still hopes to contract for a similar facility in Idaho. Interview with Charles Fenton, President, Buckingham Security Services, Ltd., and Warden, Butler County Jail, in Butler, Pa. (Jan. 6, 1986) [hereinafter Fenton Interview].

criticism from some lawmakers,[16] several states hope to contract with private firms for prison operations and have enacted, or are considering, legislation authorizing privatization.[17] In light of these developments, the courts will now have to decide cases arising in correctional facilities in which not only the cafeterias and classrooms, but the hearing rooms and cellblocks themselves, are staffed by corporate personnel. The current judicial approach, reluctance to rigorously scrutinize internal prison procedures, is, however, unequal to this task.

II. Deferential Judicial Review of Public Prison Procedures and the Wide Discretion of Prison Personnel

A. *Deference*

In reviewing complaints of unconstitutional prison practices, the courts long adhered to a "hands-off" approach, refusing altogether to examine alleged violations on the premise that prisoner rights were nonexistent.[18] In the areas of inhumane conditions or treatment (which fall under the Eighth Amendment)[19] and practices that are facially discriminatory or vi-

16. Telephone interview with Representative David Wright, Pennsylvania House of Representatives (Dec. 17, 1985) (legislator in whose district privately operated minimum security facility is located expresses reservations about privatization).

17. Texas, which does not yet have a privatized correctional facility, has a brief enabling statute that authorizes counties to contract for the incarceration of low-risk inmates in private detention facilities, Tex. Rev. Civ. Stat. Ann. art. 5115d(a) (Vernon Supp. 1986), and New Mexico has a statutory scheme that authorizes the Governor and the Legislature to direct the Department of Corrections to contract with private firms for the operation of any minimum security facility. N.M. Stat. Ann. § 33-1-17 (Cum. Supp. 1986). The Tennessee Legislature is now considering a bill to negotiate with private firms for the operation of a medium-security work camp. Wall St. J., Aug. 29, 1986, at 38, col. 1. In December, 1985, the Tennessee Legislature passed a statute, Tenn. Code Ann. §§ 3-15-101 to -108 (1985), establishing a Select Oversight Committee on Corrections, one of whose duties is to review the possibilities for "[p]rovision of services, facilities or programs by private contractors." *Id.* at § 3-15-107. In March, 1985, the National Governors' Association passed a resolution declaring that states might wish to explore the possibilities of prison privatization, and several governors publicly expressed their eagerness to do so. N.Y. Times, Mar. 2, 1985 at 35, col. 1. In March, 1986, the Pennsylvania House of Representatives passed the Private Prison Moratorium and Study Act, Act No. 1986-19, 1986 Pa. Legis. Serv. 7 (Purdon) (to be codified at 61 Pa. Cons. Stat. §§ 1081–1085), imposing a one year ban on privatization (existing facilities are specifically exempted) and establishing a Private Prison Task Force to study and conduct hearings on the issue.

18. *See, e.g.*, Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871) (convict is "the slave of the State").

19. Perhaps the best illustration of the hands-on approach in the Eighth Amendment context is that provided by the Arkansas prison litigation, which extended from 1965 until 1982, and in which successive federal courts intervened to remedy grave abuses in that state's penal system. *See, e.g.*, Holt v. Sarver [Holt II], 309 F. Supp. 362, 381 (E.D. Ark. 1970) ("dark and evil" world of Arkansas penitentiary facilities unconstitutional on Eighth Amendment grounds), *aff'd*, 442 F.2d 304 (8th Cir. 1971) (finding additional unconstitutional conditions); Holt v. Sarver [Holt I], 300 F. Supp. 825 (E.D. Ark. 1969) (holding conditions of confinement in prison system violative of Eighth Amendment); Jackson v. Bishop, 268 F. Supp. 804 (E.D. Ark. 1967) (permanently enjoining use of "Tucker Telephone" electric shock device, teeter board, and whipping; restraining use of "strap"), *vacated in part on other grounds*, 404 F.2d 571 (8th Cir. 1968). Entire prison systems in other states also have been deemed violative of the Eighth Amendment. *See, e.g.*, Ruiz v. Estelle, 679 F.2d 1115 (5th Cir.

olative of First Amendment rights,[20] however, the courts have all but abandoned this approach in favor of a "hands-on" readiness to hear and redress prisoner complaints,[21] even when remedies require courts to supervise long-term restructuring of large state prison bureaucracies.[22] Nonetheless, in areas profoundly affecting the Fourteenth Amendment liberty interests and process rights of prison inmates, the courts have continued to accord broad deference to the judgment of prison personnel.[23] This deference reflects an increasingly positivist conception of due process rights—that only interests specifically created by statute or practice merit judicial protection[24]—a recognition of correctional officers' expertise,[25]

1982) (Texas), *cert. denied*, 460 U.S. 1042 (1983); Palmigiano v. Garrahy, 443 F. Supp. 956 (D.R.I. 1977) (Rhode Island); Pugh v. Locke, 406 F. Supp. 318, 330 (M.D. Ala. 1976) (Alabama), *aff'd and remanded sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. denied in pertinent part*, 438 U.S. 915 (1978); *cf.* Rhem v. Malcolm, 371 F. Supp. 594 (S.D.N.Y. 1971) (New York City), *aff'd in part, remanded on other grounds*, 507 F.2d 333 (2d Cir. 1974).

20. *See, e.g.*, Procunier v. Martinez, 416 U.S. 396 (1974) (guaranteeing freedom of expression in case involving prison censorship); *id.* at 428 (Marshall, J., concurring) ("When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions . . . ."); Bryant v. McGinnis, 463 F. Supp. 373 (W.D.N.Y. 1978) (guaranteeing Muslims right to practice faith). *But see* Jones v. North Carolina Prisoners Labor Union, 433 U.S. 119 (1977) (warden may constitutionally bar union meetings).

21. There is some evidence, however, that the Supreme Court's attitude remains ambivalent. *See, e.g.*, Atiyeh v. Capps, 449 U.S. 1312, 1315–16 (1981) ("nobody promised them [prisoners] a rose garden"); Estelle v. Gamble, 429 U.S. 97 (1976) (negligent medical treatment by prison medical staff not cruel and unusual punishment); Bronstein, *Prisoners and Their Endangered Rights*, 65 PRISON J. 3, 4 (Spring-Summer 1985) ("[T]he Burger-Rehnquist Court has moved us, though not full circle back to the slave-of-the-state era, two-thirds of the way back.").

22. *See* O. FISS & D. RENDLEMAN, INJUNCTIONS 528–752 (2d ed. 1984) (case study of extensive judicial use of injunctive power to oversee reform of entire Arkansas prison system throughout seventeen-year period of litigation).

23. *See generally* Hirschkop & Millemann, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795 (1969):

> Prisoners often have their privileges revoked, are denied the right of access to counsel, sit in solitary or maximum security or lose accrued "good time" on the basis of a single, unreviewed report of a guard. When the courts defer to administrative discretion, it is this guard to whom they delegate the final word on reasonable prison practices. This is the central evil in prison . . . the unreviewed administrative discretion granted to the poorly trained personnel who deal directly with prisoners.

Id. at 811–12 (footnote omitted).

24. *See* Herman, *The New Liberty: The Procedural Due Process Rights of Prisoners and Others Under the Burger Court*, 59 N.Y.U. L. REV. 482, 570–74 (1984) (arguing that liberty interests, unlike property rights, should be defined and safeguarded according to Constitution, not state law); Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 447–49, 457–70 (1977) (despite demise of right-privilege distinction, plaintiff must show entitlement cognizable in positive law); Note, *The Procedural Due Process Approach to Administrative Discretion: The Courts' Inverted Analysis*, 95 YALE L.J. 1017, 1021–22 (1986) (noting irony that courts afford full due process protection when state statute or practice specially regulates procedures of prisons or other public bodies, but feel no such obligation when state affords such bodies "unfettered discretion").

25. *See* Bell v. Wolfish, 441 U.S. 520, 562 (1979) ("[T]he inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution or, in the case of a federal prison, a statute. The wide range of 'judgment calls' that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government.").

and a belief in the utility of governmental delegation in the administrative state.[26]

In *Procunier v. Martinez*,[27] the Supreme Court, while finding that official censorship stated a colorable First Amendment claim, nonetheless expounded a deferential approach that it has since chosen to follow in cases involving Fourteenth Amendment liberty interests and process rights:

> Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say that the problems of prisons in America are complex . . . they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the committment of resources, all of which are peculiarly within the province of the legislative and executive branches of government . . . . [C]ourts are ill equipped to deal with the increasingly urgent problems of prison administration . . . .[28]

This rationale frees prison personnel to exercise virtually unfettered discretion over the day to day conditions of confinement, short of engaging in the most egregiously abusive practices. Reasoning that corrections personnel are best situated to adopt and execute policies necessary for institutional order, the Court has held that staff members may isolate inmates,[29] restrict their incoming mail,[30] determine how many beds a cell will hold,[31] prohibit contact visits,[32] and limit eligibility for rehabilitation programs.[33]

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26. *See* K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 2.00-2 to -3 (Supp. 1970) (discussing cases which show failure of non-delegation doctrine).

27. 416 U.S. 396 (1974).

28. *Id.* at 404-05 (footnote omitted).

29. Hewitt v. Helms, 459 U.S. 460, 467-68 (1983).

30. In Bell v. Wolfish, 441 U.S. 520, 549-55 (1979), the Court upheld prison rules that prohibited pretrial detainees from receiving packages and from receiving books other than from publishers or book stores. *But cf.* Spruytte v. Walters, 753 F.2d 498 (6th Cir. 1985) (right to receive publications, a legitimate liberty interest, not hazardous to institutional security), *cert. denied*, 106 S. Ct. 788 (1986).

31. *Wolfish*, 441 U.S. at 541-43 (double-bunking does not violate detainees' due process right to be free from preadjudicative punishment).

32. Block v. Rutherford, 468 U.S. 576 (1984) (upholding city jail's blanket prohibition of contact visits for pre-trial detainees on grounds of need for institutional discipline and security).

33. Moody v. Daggett, 429 U.S. 1 (1976) (inmates had no due process or statutory entitlement to challenge government discretion, granted by 18 U.S.C. § 4081 (1982), in determining eligibility for prison rehabilitation programs).

B. *Discretion*

Disciplinary rules in correctional facilities are made in an informal and discretionary way. Prisons are "total institutions" where guards determine, on an everyday basis, what inmates may and may not do.[34] By statute or by practice, most states authorize prison wardens to draft institutional rules,[35] and provide few statewide regulations for institutional discipline.[36] Because of a willingness to rely on the training and expertise of correctional officers, the courts[37] and the state legislatures[38] leave the enforcement of these rules to the discretion of prison staff.

Prison staff also exercise substantial effective control over the duration and terms of confinement through a broad range of adjudicative functions. Line officers' recommendations influence parole examiners' assessments of the likelihood that an inmate will violate parole conditions or the law upon release.[39] At disciplinary hearings, prison personnel assess behavior, determine guilt or innocence, and impose sanctions.[40] In these hearings, as in proceedings regarding parole release, inmate transfer, administrative

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34. *See* E. GOFFMAN, ASYLUMS 7-9 (1961) (analyzing restrictions placed on inmates by staff in total institutions); L. ORLAND, *supra* note 2, at 66-69 (describing and criticizing "pervasive system of authoritarian rules, covering every aspect of institutional life"); G. SYKES, THE SOCIETY OF CAPTIVES xiv-xvi, 23-25 (1958) (discussing regimentation and control in maximum security prison).

35. *See, e.g.*, NEB. REV. STAT. § 83-185(1) (1981) ("The chief executive officer of each facility shall be responsible for the discipline of those . . . who reside therein.").

36. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539, 542 n.1 (1974).

37. The courts have subjected such discretion only to the limited review provided by *Wolff* and its progeny. *See* United States *ex rel.* Miller v. Twomey, 479 F.2d 701, 712-13 (7th Cir. 1973) (" 'Liberty' and 'custody' are not mutually exclusive concepts. . . . [T]his does not mean, however, that every decision by prison officials should be subject to judicial review or that the courts rather than experienced administrators should write prison regulations.").

38. For example, pursuant to statute, NEB REV. STAT. §§ 83-185, -1107 (1981), prison authorities in Nebraska have formulated regulations providing for (a) preparation of misconduct reports by line officers, (b) investigation by shift lieutenants, and (c) review and further investigation by chief corrections officers or supervisors. The regulations further provide that all information obtained in the investigation is to be noted in the guard's report, and that the disciplinary review committee is to consider this document in imposing sanctions. NEBRASKA PENAL AND CORRECTIONAL COMPLEX PENITENTIARY UNIT GENERAL POLICY AND PROCEDURE: INMATE CONTROL, MISCONDUCT, AND THE ADJUSTMENT (1971), *reprinted in* McDonnell v. Wolff, 342 F. Supp. 616, 646 app. Q (D. Neb. 1972), *aff'd in part, rev'd in part*, 483 F.2d 1059 (8th Cir. 1973), *aff'd in part, rev'd in part*, 418 U.S. 539 (1974).

39. *See, e.g.*, NEB. REV. STAT. § 83-1114(2)(l) (1981) (listing as factor "the offender's conduct in the [correctional] facility"); *see also* L. ORLAND, *supra* note 2, at 77 ("triple jeopardy" to inmate's freedom since same committee that orders punishment also has power to revoke good time and to report misconduct to parole board); *cf.* 28 C.F.R. § 2.34(c) (1986) (federal hearing examiners specifically authorized to treat findings of Institution Disciplinary Committee as "conclusive evidence of institutional misconduct").

40. Hearing committees often include line officers as well as supervisory personnel and are empowered to weigh guards' reports on any use of force, occurrence of injury, or other circumstance of an infraction. *See* L. ORLAND, *supra* note 2, at 74 ("adjustment committee" in New York State Penitentiary at Attica could include line officers as well as civilian employees); G. HAWKINS, THE PRISON 142-43 (1976) (describing wide administrative discretion in internal prison disciplinary proceedings); *cf.* Inmate Discipline and Special Housing Units, 28 C.F.R. §§ 541.14-541.18 (1985) (staff members may sit on Institution Discipline Committees).

segregation, and good time credits, the Supreme Court has determined that prisoners' liberty interests are diminished and that due process rights attach, for the most part, only to those entitlements specifically created by state law or practice.[41]

Correctional personnel exercise wide discretion over inmates' liberty interests in other areas of prison life as well. The Supreme Court has consistently upheld guards' intrusions on inmates' privacy against both due process and Fourth Amendment challenges, again premising its deference on the institutional security rationale.[42] The Court has also held recently that, absent a showing of intent or deliberate indifference, a prison official's mere negligence or lack of due care that results in injury to an inmate does not constitute a due process deprivation.[43]

III. Judicial Hostility to Private, For-Profit Delegations

In a private prison, these adjudicative and rulemaking functions that courts have traditionally left to the broad discretion of prison officers—implicating core liberty interests—will now be exercised by *private* employees. One must therefore inquire whether the deference paid prison officials is compatible with the rules which courts have applied in assessing the validity of delegations to private parties with potential financial biases.

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41. *See* United States v. Gouveia, 467 U.S. 180 (1984) (inmates not entitled to appointed counsel while in administrative segregation and before initiation of adversary proceedings); Olim v. Wakinekona, 461 U.S. 238 (1983) (interstate prison transfers, even across 4000 miles of ocean, implicate no liberty interest); Hewitt v. Helms, 459 U.S. 460 (1983) (informal, nonadversarial evidentiary review before isolating inmate satisfies due process); Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979) (full hearing rights not required for parole release decision; while parole revocation requires process due one already at liberty, release requires only proeess due one who merely desires such liberty); Meachum v. Fano, 427 U.S. 215, 228 (1976) (due process does not require pre-transfer hearing or limit prison officials' discretion as to transfers); Wolff v. McDonnell, 418 U.S. 539, 559–72 (1974) (only limited due process protections required at disciplinary hearings and good time proceedings; same rationale as *Greenholtz*); Brown v. Frey, 40 Crim. L. Rep. (BNA) 2285 (8th Cir. Dec. 24, 1986) (cursory statement referring to investigatory reports sufficient notice of evidence relied upon by disciplinary board in depriving prisoner of liberty interest); Neb. Rev. Stat. § 83-185(2) (1981) (misconduct punishment shall be deprivation of privileges, but warden may revoke statutory good time in cases of serious or flagrant misconduct); Jacobs, *Sentencing by Prison Personnel: Good Time*, 30 UCLA L. Rev. 217, 221–24, 237 (1982) (most states award good time subject only to good behavior, but courts hold good time may be summarily revoked).

42. *See* Hudson v. Palmer, 468 U.S. 517, 526, 530–36 (1984) (intentional destruction of inmate's property during shakedown search violated neither Fourth Amendment nor due process since the former "does not apply within the confines of the prison cell" and since, in satisfaction of the latter, inmate had adequate post-deprivation remedies under state law); Bell v. Wolfish, 441 U.S. 520, 556–61 (1979) (upholding visual body cavity searches of pre-trial detainees and routine shakedown searches of their cells; citing detainees' diminished privacy interests and requirements of institutional security); Wolff v. McDonnell, 418 U.S. at 574–77 (sanctioning state's practice of opening and inspecting mail from attorneys).

43. Davidson v. Cannon, 106 S. Ct. 668 (1986); Daniels v. Williams, 106 S. Ct. 662 (1986).

A. *The Nondelegation Doctrine*

Article I, section 1 of the United States Constitution provides that "All legislative Powers herein granted shall be vested in a Congress of the United States."[44] Strictly interpreted, this clause prohibits Congress from delegating its legislative powers to any other institution or party,[45] but, with the expansion of the administrative state and the concomitant need for bureaucratic discretion, the principle of per se nondelegability has been widely criticized as moribund,[46] and the courts have long ceased to employ it to invalidate delegations of rulemaking and adjudicative authority to public bodies.[47] Intermittently, Supreme Court decisions have expressed concern with the breadth of such delegation,[48] but they have generally manifested this concern by narrowly construing statutes conferring power on the Executive, rather than by mandating strict standards for their implementation.[49] In addition to its general deference to administra-

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44. U.S. CONST. art. I, § 1.

45. The idea that Congress retains nondelegable powers first appeared, as dictum, in Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825):

> The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions, to fill up the details.

23 U.S. (10 Wheat.) at 43. The nondelegation doctrine itself was first, and most rigidly, articulated by the Court in Field v. Clark, 143 U.S. 649, 692 (1892), though even there the Court upheld a statutory provision authorizing the President to make tariff determinations. *Id.* at 692–93; *see also* Carter v. Carter Coal, 298 U.S. 238 (1936) (invalidating statute delegating wage- and hour-setting powers to private coal producers); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935) (invalidating portion of National Recovery Act allowing President to set standards for firm competition upon recommendation of majority of firms in industry); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (invalidating law granting President power to prevent interstate transfer of "hot oil").

46. *See, e.g.*, K. DAVIS, *supra* note 26, § 2.00 ("The non-delegation doctrine is almost a complete failure."); Jaffe, *An Essay on Delegation of Legislative Power: II*, 47 COLUM. L. REV. 561, 581 (1947) ("[I]nsistence on the doctrine of the *Schechter* case might again provoke a constitutional crisis. . . . Realistically considered *Schechter* has been put in the museum of constitutional history."); Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985) (nondelegation theory "quite weak").

In the last few years, however, a growing number of commentators have argued for a revival of the nondelegation doctrine. *See, e.g.*, T. LOWI, THE END OF LIBERALISM 92–98 (2d ed. 1979) (criticizing broad delegation as "policy without law"); Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 65 (1982) (arguing for renewal of doctrine under which "the judiciary would nullify all delegations of legislative authority"); Schoenbrod, *The Delegation Doctrine: Could the Court Give It Some Substance?*, 83 MICH. L. REV. 1223, 1228 (1985) (same).

47. *See, e.g.*, Lichter v. United States, 334 U.S. 742, 774–87 (1948) (rejecting nondelegation challenge to Renegotiation Act of 1942, which provided for broad administrative power to determine "excessive profits" recoverable on war subcontracts); Yakus v. United States, 321 U.S. 414, 424 (1944) (distinguishing *Schechter* as case where "[t]he function of formulating the codes was delegated . . . to private individuals engaged in the industries to be regulated").

The Administrative Procedure Act, 5 U.S.C. § 706 (2)(A),(B) (1982), provides federal courts with independent statutory authority to invalidate overbroad delegations.

48. *See, e.g.*, Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 646 (1980) (plurality opinion) (remanding to Secretary of Labor to establish narrower standards for OSHA rule application).

49. *E.g.*, National Cable Television Ass'n v. United States, 415 U.S. 336, 342 (1974) (Congress

tive expertise,[50] the Court's permissiveness toward legislative delegation probably derives from a hesitance to contravene congressional policy based on what it considers to be vague Article I or separation of powers concerns in the abstract—that is, absent a specific showing that an enumerated provision of the Constitution has been violated.[51]

B. *De Facto Application of the Nondelegation Doctrine to Private, For-Profit Entities Through the Due Process Clause*

In the narrow context of delegations of governmental functions to private, for-profit entities, however, both federal and state courts have effectively preserved the nondelegation principle.[52] In the landmark case of *Schechter Poultry Corp. v. United States*,[53] the Supreme Court held Congress' delegation to private groups of authority to set codes of industrial competition "utterly inconsistent with the constitutional prerogatives and duties of Congress"[54] because of the danger that profit-seeking might influence the rulemaking process:

> But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? . . . The answer is obvious. Such a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress.[55]

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should not be presumed to have delegated taxing authority conferred on it by Article I). *But cf.* Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972) (vague statute impermissibly delegated basic policy matters to law enforcement personnel for ad hoc and subjective decisions, thereby risking abuse); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (laundry licensing scheme giving board of county supervisors unconstrained discretion and not providing standards violates Fourteenth Amendment).

50. *See, e.g.*, Zemel v. Rusk, 381 U.S. 1, 17–18 (1965) (Secretary of State has wide discretion in issuing passports).

51. *See* Lathrop v. Donohue, 367 U.S. 820, 855 (1961) (Harlan, J., concurring) ("[I]t is by no means clear to me in what part of the Federal Constitution we are to find the prohibition of *state-authorized* self-regulation of and by an economic group that the *Schechter* case found in Article I as respects the Federal Government."); *cf.* Jones v. SEC, 298 U.S. 1, 32–33 (1936) (Cardozo, J., dissenting) ("Appeal is vaguely made to some constitutional immunity, whether express or implied is not stated with distinctness. . . . If the immunity rests upon some express provision of the Constitution, the opinion of the Court does not point us to the article or section.").

52. The constitutional roots of this principle lie in the Court's traditional hostility, derived from common law, to statutes that give private parties the power to control or coerce the actions of others. *See, e.g.*, Washington *ex rel.* Seattle Trust Co. v. Roberge, 278 U.S. 116, 121–23 (1928) (invalidating municipal zoning ordinance that gave neighbors veto power over property owner's choice of land use; explicitly finding danger of bias and self-interest violates due process); Eubank v. City of Richmond, 226 U.S. 137 (1912) (striking down similar enactment that conferred power to establish building setback lines on owners of abutting property).

53. 295 U.S. 495 (1935).

54. *Id.* at 537.

55. *Id.*

Although the *Schechter* doctrine of invalidating delegations on vague Article I grounds without specific reference to enumerated constitutional provisions has retained vitality in a few states,[56] most federal and state courts have relied on a due process rationale instead.[57] In particular, courts have advanced three criteria for scrutinizing the vesting of discretionary governmental powers in private, for-profit individuals or groups.

First, the Supreme Court has long evinced a hostility toward the delegation of discretionary or adjudicative powers[58] to financially interested parties, explicitly rejecting the argument that its review should focus only on *actual* bias and invalidating such delegations as per se violations of due

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56. *See, e.g.*, People *ex rel.* Rudman v. Rini, 63 Ill. 2d 321, 356 N.E.2d 4 (1976) (statute authorizing political party to fill county office vacancies unconstitutional delegation of sovereign power of state to private groups; such power delegable, if at all, only to public agency); Gamel v. Veterans Memorial Auditorium Comm'n, 272 N.W.2d 472 (Iowa 1978) (statute providing that veterans organizations choose commissioners for memorial buildings and monuments impermissibly delegated legislative authority to private groups to extent it gave private groups powers of public appointment and expenditure); Hetherington v. McHale, 458 Pa. 479, 486, 329 A.2d 250, 254 (1974) (invalidating statute giving three companies near majority of committee charged with disbursing public funds; "statutory standards provide no substitute for the processes of representative government . . . .").

57. This choice has had the effect of making constitutional restrictions on private delegations equally applicable to the states through the Fourteenth Amendment, a result which would not have arisen under a per se Article I ban. *See, e.g.*, Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L.J. 650, 652–53, 654 n.16 (1975) (due process "doing some of the work formerly done by the nondelegation doctrine"); K. DAVIS, *supra* note 26, §§ 2.00 to 2.00-6 (arguing for due process-nondelegation merger); *see also* United States v. McGautha, 402 U.S. 183, 272–73 (Brennan, J., dissenting) (noting that "candor compels recognition that our cases regarding the delegation by Congress of lawmaking power do not always say what they seem to mean"; arguing that "[w]hatever the sources of the [nondelegation] doctrine, its application to the States as a matter of due process is merely a reflection of the fundamental principles of due process").

58. Several commentators have argued for a distinction between adjudicative and rulemaking functions: that the Court, where laws have delegated rulemaking authority to private parties, should validate such delegation on the reasoning that it is prospective in nature and general in application and hence carries less of a risk of vindictiveness or abuse than the delegation of adjudicative authority, which operates retrospectively and applies to particular circumstances or individuals. *See, e.g.*, K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2.15 (1958) ("[T]he safeguards required for adjudication are greater than those required for general rule making."); Liebmann, *supra* note 57, at 659–65, 682–83 (abuses of licensing powers more dangerous than abuses of rulemaking powers). Two Supreme Court decisions seem to accept the proffered distinction. Friedman v. Rogers, 440 U.S. 1, 18–19 (1979) (rejecting claim that alleged bias in rulemaking only; claimant produced no evidence of "any disciplinary proceeding against him."); Hortonville Joint School Dist. v. Hortonville Educ. Ass'n, 426 U.S. 482 (1976) (upholding layoffs of striking teachers, since decision based on school board policy, not on adjudication).

Even in the area of delegation to public parties, however, this distinction has been murky at best. *See* Elrod, *The Effect of Procedural Due Process on State and Local Governmental Decisionmaking: Beyond* Roth *and* Eastlake, 31 DE PAUL L. REV. 679, 706 & n.204, 709–10 (1982) (discussing several instances in which distinction wholly formalistic). *Compare* South Gwinnett Venture v. Pruitt, 491 F.2d 5 (5th Cir.) (en banc) (procedural due process did not apply because rezoning decision "legislative"), *cert. denied*, 416 U.S. 901 (1974) *with* Fasano v. Board of County Comm'rs, 264 Or. 574, 580–81, 507 P.2d 23, 26 (1973) (zoning change affecting "a specific piece of property" is "usually an exercise of judicial authority"). There is no apparent reason why, in the area of delegations to private parties, the distinction should be any more discernible. In any event, even if viable as a general proposition, the distinction is moot in the prison context, since the discretionary nature of a correctional officer's job gives it a clearly adjudicative aspect, whatever rulemaking element it possesses as well. *See supra* notes 34–41 and accompanying text.

process upon a finding of *threatened* abuse alone.[59] In *Carter v. Carter Coal Co.*,[60] decided only a few months after *Schechter*, the Supreme Court invalidated the Bituminous Coal Conservation Act of 1935 (delegating to private producers the power to regulate work hours and wages), pointing to the same intolerable combination of unaccountability and financial self-interest[61] that it had disapproved in *Schechter*, but advancing as its rationale the fact that the Act's delegation "deprived petitioners of rights safeguarded by the due process clause of the Fifth Amendment."[62]

In *Fuentes v. Shevin*,[63] the Court held unconstitutional, on due process grounds, statutes permitting a private party summarily to obtain a prejudgment writ of replevin and to compel the sheriff to seize property in execution of the writ. Again, the Court was concerned with the abdication of effective state power to profit seekers, citing a special danger when private parties seeking private gain can invoke state power.[64] In several cases, the Court has expressly distinguished between the conflicts of interest which the vesting of public authority in private, profit-seeking hands creates and the tolerable possibility that public agency administrators may have previous exposure, experience, or opinions concerning matters over

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59. *See, e.g.*, Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972) (judge with financial interest in case had to recuse himself in civil proceeding; test is whether circumstances "would offer a *possible* temptation to the average man as a judge . . . not to hold the balance nice, clear and true") (emphasis added) (quoting Tumey v. Ohio, 273 U.S. 510, 531–32 (1927) (criminal case; same holding)); *see also* Aetna Life Ins. v. Lavoie, 106 S. Ct. 1580, 1585 (1986) (Alabama Supreme Court Justice violated due process and effectively acted as "a judge in his own case" by failing to recuse himself in case where he had "direct, personal, substantial pecuniary interest") (quoting *Ward*, 409 U.S. at 60; *Tumey*, 273 U.S. at 523); *id.* at 1590 (Brennan, J., concurring) ("The participation of a judge who has a substantial interest in the outcome of a case of which he knows at the time he participates *necessarily* imports a bias into the deliberative process."); Wolkenstein v. Reville, 694 F.2d 35, 42 (2d Cir. 1982) (explicitly applying *Tumey* test)). Those delegations to private, for-profit entities that the Court has upheld have involved circumstances where the private role has remained subordinate to a preeminent public involvement, such as statutes providing for approval of governmental market controls by producers, United States v. Rock Royal Coop. Inc., 307 U.S. 533, 578 (1939); Currin v. Wallace, 306 U.S. 1, 15–16 (1939), and for the nonbinding proposal of minimum prices by industry boards, Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 399 (1940).

60. 298 U.S. 238 (1936).

61. *Id.* at 311 ("This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.").

62. *Id.*; *see also* Highland Farms Dairy v. Agnew, 300 U.S. 608, 614 (1937) (upholding Virginia statute creating state milk marketing board with authority to fix minimum rates; due process violated not by delegation to official agencies but by delegation to private entities "with arbitrary capacity to make their will prevail as law").

63. 407 U.S. 67 (1972).

64. *Id.* at 81, 93 ("The statutes . . . abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another."); *accord* Perez v. Campbell, 403 U.S. 67 (1972) (invalidating law which allowed judgment creditors of motorists involved in automobile accidents to initiate suspension (and consent to restoration) of drivers' licenses); *cf.* United States v. Mazurie, 419 U.S. 544, 556–58 (1975) (upholding delegation to Indian tribes of power to control liquor licensing on their reservations since such tribes lawful, quasi-governmental delegates; expressly distinguishing tribes from unauthorized private parties).

which they exercise adjudicative discretion.[65] State courts, moreover, applying their own constitutional provisions, have been even more emphatic in invalidating potentially abusive and profiteering delegations on due process grounds.[66]

The second criterion that courts have applied in reviewing delegations of discretionary power to private groups is whether such delegation threatens fundamental rights or sensitive liberty interests.[67] The Supreme Court has long refused to countenance the exploitation of convicts by private employers,[68] and courts have struck down statutes empowering pri-

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65. *Compare* Gibson v. Berryhill, 411 U.S. 564, 578 (1973) (Alabama Board of Optometry, composed entirely of private practitioners, not sufficiently impartial entity to adjudicate allegedly "unprofessional conduct" of salaried optometrists employed by private corporation since practitioners had personal economic stake in determination which discouraged corporate practice of optometry) *with* Withrow v. Larkin, 421 U.S. 35, 46–47 (1975) (granting strong presumption of impartiality to public investigative and adjudicative board but explicitly affirming more severe treatment given to private deliberative entities) *and* Richardson v. Perales, 402 U.S. 389 (1971) (demand that administrative agencies separate functions "assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity"; citing need for officials to act in several different capacities).

66. *See, e.g.*, Nissan Motor Corp. v. New Motor Vehicle Bd., 153 Cal. App. 3d 109, 202 Cal. Rptr. 1 (1984) (California New Motor Vehicle Board prima facie unconstitutional, on due process grounds, since four of nine Board members had heavy financial interests in Board's determinations); Colorado Energy Advocacy Office v. Public Serv. Co., 704 P.2d 298 (Colo. 1985) (en banc) (private control of utility ratemaking); Gumbhir v. Kansas State Bd. of Pharmacy, 228 Kan. 579, 618 P.2d 837 (1980) (delegation of licensing authority to private professional association); Boston Milk Producers, Inc. v. Halperin, 446 A.2d 33 (Me. 1982) (delegation of taxing authority to private group); *In re* Opinion of the Justices, 151 N.E.2d 631 (Mass. 1958) (scheme providing for self-regulation of barber shop hours); Coffman v. State Bd. of Examiners in Optometry, 331 Mich. 582, 50 N.W.2d 322 (1951) (delegation to professional group of power to set standards for admission to practice of optometry); Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ., 78 N.J. 144, 393 A.2d 278 (1978) (self-serving collective bargaining agreement); Concordia Collegiate Inst. v. Miller, 301 N.Y. 189, 93 N.E.2d 632 (1950) (property owners' veto of educational use permits); Ohio Motor Licensing v. Memphis Auto Sales, 142 N.E.2d 268, 275 (Ohio 1957) (statutes granting corporate-franchised dealers monopoly on sale of new cars); *In re* Stanley, 204 Pa. Super. 29, 32, 201 A.2d 287, 289 (1964) (practice under which individual vested with special powers of constable functioned simultaneously as private detective); Jennings v. Exeter W. Greenwich Regional School Dist. Comm., 116 R.I. 90, 97, 352 A.2d 634, 638 (1976) (statutory scheme delegating control over public school district busing); House of Seagram, Inc. v. Assam Drug Co., 176 N.W.2d 491, 495 (S. Dak. 1970) ("the legislature may not delegate to private persons discretionary power to fix wages, prices or rates"); United Chiropractors of Washington, Inc. v. State, 90 Wash. 2d 1, 578 P.2d 38 (1978) (en banc) (delegation of licensing and disciplining authority to private practitioners).

67. This criterion is based on substantive due process principles which protect basic rights and values deemed not to derive from the state. *See* Roe v. Wade, 410 U.S. 113 (1973) (right to procure abortion); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to receive contraception). In the private prison context, these fundamental rights are implicated by private personnel adjudicating inmates' (concededly limited) liberty interests. *See infra* text accompanying notes 85–90.

68. *See, e.g.*, United States v. Reynolds, 235 U.S. 133 (1914) (state statute allowing private employers to hire convicts as laborers without fixing any limits on power of employer over convicts violates 13th Amendment); Pollock v. Williams, 322 U.S. 4 (1944):

> [I]n general the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers. When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work.

Id. at 18.

vate parties to enact penal laws,[69] to control a city police department,[70] to maintain and take custody of state convicts,[71] and to impair constitutional rights of expression in public areas of a company town.[72] In two frequently cited opinions involving the vesting of discretionary power in *public* entities, Justice Brennan has argued for a limited reinvocation of the nondelegation principle (along due process lines) where sensitive liberty interests are at stake.[73]

The third criterion is the absence of standards governing private delegations.[74] The due process test for delegation of power is most often manifested in the requirement of sharply articulated standards guarding against abuse of discretion: a "clear statement"[75] by the legislature of what the delegate's authority is to be. In *Todd & Co. v. SEC*,[76] the Third Circuit outlined the safeguards necessary to protect a statute delegating regulatory power over a securities market to private entities against invalidation on due process grounds; the statute was upheld because it required the organizations concerned to adopt detailed rules.[77] The New York Court of Appeals has twice struck down statutes vesting licensing powers over harness racing in private groups without providing standards,[78] and the New Jersey Supreme Court has invalidated a statute delegating to a medical society, a private corporation, the power to determine who may practice medicine in the state.[79]

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69. *E.g.*, Bayside Timber Co. v. Bd. of Supervisors, 20 Cal. App. 3d 1, 97 Cal. Rptr. 431 (1971) (statute delegating to timber owners power to enact forest laws); Olinger v. People, 140 Colo. 397, 344 P.2d 689 (1959) (en banc) (statute delegating to private citizens organized in "soil conservation district" power to decide that landowner commits crime when he breaks sod for planting). For cases invalidating such delegations to public parties, see Howell v. State, 300 So. 2d 774 (Miss. 1974) (statute authorizing state agency to determine criminal penalties associated with controlled substance offenses); State v. Jaramillo, 83 N.M. 800, 801, 498 P.2d 687, 689 (1972) (statute authorizing custodian of public property to request anyone to leave who, in his judgment, was using property "contrary to its intended or customary use" and made refusal to obey criminal offense).

70. City of Covington v. Covington Lodge No. 1, 622 S.W.2d 221 (Ky. 1981) (compulsory arbitration clause in police union's contract unconstitutionally delegates legislative authority to arbitrator).

71. *See supra* note 4.

72. Marsh v. Alabama, 326 U.S. 501 (1946) (state cannot punish person for distributing religious literature on premises of company-owned town).

73. McGautha v. California, 402 U.S. 183, 272 nn.21–22 (1971) (Brennan, J., dissenting) (statute which delegated to jury power to impose death penalty but did not propose guidelines violated due process); United States v. Robel, 389 U.S. 258, 275 (1967) (Brennan, J., concurring in result) ("area of permissible indefiniteness [of standards] narrows . . . when the regulation invokes criminal sanctions and potentially affects fundamental rights").

74. This third criterion derives from the procedural branch of due process which, under the analysis of Goss v. Lopez, 419 U.S. 565, 572 (1975), invalidates any state action that deprives a person of a protected life, liberty, or property interest without due process of law.

75. For a discussion of this test, see Gewirtz, *The Courts, Congress, and Executive Policymaking: Notes on Three Doctrines*, LAW & CONTEMP. PROBS., Summer, 1976, at 46, 66.

76. 557 F.2d 1008 (3d Cir. 1973).

77. *Id.* at 1015–16.

78. Murtha v. Monaghan, 4 N.Y.2d 897, 151 N.E.2d 83 (1958); Fink v. Cole, 302 N.Y. 216, 97 N.E.2d 873 (1951).

79. Such power, wrote the Court, could not be delegated to a

IV. Applying the Due Process Standard in Private Prisons

This judicial hostility to delegations that pose a risk of abuse by for-profit entities is incompatible with the deference that courts pay to correctional officials. With the advent of private prisons, this tension is no longer merely hypothetical.[80] Any privatization of disciplinary and discretionary functions in prisons will allow personnel paid and managed by private corporations to impose rules upon inmates convicted by the state. Private prisons implicate each of the three nondelegation concerns outlined above: financial bias, impingement on fundamental rights, and absence of standards. Application of these three criteria thus becomes necessary to determine the permissible scope of prison privatization.

A. *The Danger of Financial Bias in Prison Management*

Even if constitutional in the public sector,[81] judicial deference to everyday prison decisionmaking by private, for-profit firms is unwarranted and cannot be squared with the courts' longstanding presumption against the vesting of discretionary and coercive authority in financially interested parties. While state prison authorities may be inept or worse, they lack the incentives to raise prices and reduce quality which characterize a for-profit firm.[82] Because a nonprofit entity like the state cannot pocket its profits,[83] it is less likely than a for-profit delegate to seek to maximize

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> private Board which . . . is not subject to public accountability, at least where the exercise of such power is not accompanied by adequate legislative standards or safeguards whereby an application may be protected against arbitrary or self-motivated action on the part of such private body.

Group Health Ins. v. Howell, 40 N.J. 436, 445, 193 A.2d 103, 108 (1963); *see also* Maryland Coop. Milk Producers v. Miller, 170 Md. 81, 84, 182 A. 432, 435 (1936) (invalidating vesting of power in Milk Control Commission since delegation was not to a "described locality, but to an indefinite portion of producer, consumer, and distributor classes in areas having no legislative description"); Salt Lake City v. International Ass'n of Firefighters, 563 P.2d 786 (Utah 1977) (invalidating regulations for lack of standards and safeguards).

80. Of course, it might be argued that this tension is a straw man; it is possible that the courts would *not* apply the same deferential standard to private prisons as to public facilities. However, absent any indication to the contrary, there is no reason to be confident that judges will make a proper distinction and depart from the posture of extreme deference. This Note aims to demonstrate the nonviability of such a posture in light of the courts' own precedents.

81. *But see* Hirschkop & Millemann, *supra* note 23, at 811–12 (delegation of "final word on reasonable prison practices" and "unreviewed administrative discretion" to "poorly trained personnel who deal directly with prisoners" violates Constitution); *see also* L. Orland, *supra* note 2, at 77 (citing "inherent conflict between prison and law").

82. *See* Hansmann, *The Role of Nonprofit Enterprise*, 89 Yale L.J. 835, 844 (1980) (distinguishing nonprofit and for-profit corporations).

83. Professor Hansmann has labeled this limitation the "distribution constraint":

> The nonprofit producer, like its for-profit counterpart, has the capacity to raise prices and cut quality in such cases without much fear of customer reprisal; however, it lacks the incentive to do so because those in charge are barred from taking home any resulting profits. In other words, the advantage of a nonprofit producer is that the discipline of the market is supplemented by the additional protection given the consumer by another, broader "contract," the

profits at the expense of duty. The identity and nature of the entity affording—indeed creating—or denying process rights partially determines what process is adequate or due; the judge with a pecuniary bias in a case, the licensing board member with a financial interest in excluding applicants, and the constable seeking clients for his private detective business bring to their tasks a bias which demands procedural checks.

Process rights and service delivery are expensive, and a cost-conscious manager in the employ of a for-profit firm will have an interest in limiting both. The courts' unwillingness to impose procedural checks on prison officials' decisions regarding discipline, parole, good time, inmate transfer, and eligibility for rehabilitative programs may lead to abuses by private contractors seeking to increase profits and cut costs by lengthening sentences, lumping offenders in distant, multistate facilities,[84] and limiting services provided to inmates. Reductions in the quality of health care, educational and vocational opportunities, and food services are more probable immediate responses, because they impinge less directly on liberty interests and thus are less likely to give rise to litigation. Both sorts of abuse can be expected, however, especially after the initial "honeymoon" period—in which a private contractor will seek to demonstrate its intention to meet, and perhaps even surpass, its contractual standards—has passed.

B. *Fundamental Interests and Private Prisons*

In prisons, the state exercises total control over human life. Inmates are at the mercy of the government, and must depend on prison personnel for their protection. The sensitivity of prisoners' rights, however diminished those rights may be by virtue of a criminal conviction, lies in the fact that, like children in an orphanage or nursing home patients, inmates are involuntary wards of the state, consumers without choice.[85] They are in no position to assess the services they receive or the rights they are accorded. In this setting, the liberty interests and fundamental rights that may invalidate private delegations thus take on special significance.[86] One sentenced to prison by a judge should not have his liberty interest adjudicated anew for institutional purposes by a private corporation, but that is what allowing private contractors into a penal system largely devoid of due pro-

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organization's legal commitment to devote its entire earnings to the production of services. As a result of this institutional constraint, it is less imperative for the consumer either to shop around first or to enforce rigorously the contract he makes.

Id.

84. *See supra* note 15 (Buckingham Security's plans to operate multistate facilities).

85. *See* Hansmann, *supra* note 82, at 844 (discussing situations in which consumers of services have no choice from whom they will procure services).

86. *See* Mashaw, *supra* note 46, at 93–94 (arguing that only delegations implicating these rights merit strict review).

cess guarantees would do.[87] Because prisons are beyond the ken of the everyday political and legal processes of society, and because inmates' due process rights are diminished in general, those vestiges of liberty that do persist—in particular the freedom from unjustified intrusions on personal integrity[88] and the right to safe conditions of confinement and security from attack by other inmates[89]—merit jealous protection.[90]

C. *The Necessity—and Insufficiency—of Strict Contractual Standards*

Strict standards are necessary to regulate prison privatization, but they are necessarily insufficient. Attempts to contract must reconcile the wide discretion inherent in routine prison operation[91] with the longstanding judicial hostility to private, self-serving power delegations. The constitutional concerns raised by the delegation of core prison disciplinary functions cannot be allayed by attempting to use contractual regulation to obviate judicial oversight of prison procedures; the courts' hostility to private delegations demands more. For three reasons, strict contractual provisions and enabling statutes will, at best, be only a buttress[92] to the development of a new standard of judicial review.

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87. *See* N.Y. Times, Feb. 19, 1985, at A15, col. 1 (quoting guard of private corporation operating Immigration and Naturalization Service detention center as saying "I'm the Supreme Court"); *supra* notes 39–41 and accompanying text.

88. *See* Ingraham v. Wright, 430 U.S. 651, 673–74 (1977).

89. *See* Youngberg v. Romeo, 457 U.S. 307, 315–16 (1982).

90. The Supreme Court has also found post-incarceration liberty interests that may not be deprived without constitutionally adequate standards in the area of prisoner transfers to mental hospitals. Vitek v. Jones, 445 U.S. 480, 493–94 (1980) (requiring due process hearing).

91. In the closed world of the prison, *see supra* note 34, the absence of state regulation of any aspect of institutional discretion amounts to a de facto grant of self-regulation to the private contractor.

92. Strict contracts may complement heightened judicial scrutiny by guiding discretion. For example, contracts should expressly provide—as do most state codes—for the automatic accrual of good time conditioned only on good behavior, since the absence of such a provision might allow for punitive or vindictive behavior by private personnel or might, even more dangerously, permit contractors to maximize profits by increasing time served by inmates. Almost all the planned or existing private prisons operate on a per-diem, per capita basis. CCA, for instance, charges $21 per day for each prisoner it houses at its facility in Hamilton County, Tennessee. Tolchin, *Jails Run by Private Company Force It To Face Question of Accountability*, N.Y. Times, Feb. 19, 1985, at A15, col. 1. The 268 Center, a minimum-security correctional institution north of Pittsburgh, charges $35–$37 per day for each inmate. Mausteller & Twedt, *Judge Orders 55 Inmates out of Private Jail by Tuesday*, Pittsburgh Press, March 16, 1986, at A10, col. 1. Similar strictures should also apply to parole, disciplinary, and transfer hearings, with contracts expressly providing for state monitors at all significant proceedings and for the procedural safeguards rejected in the Court's decisions (including the provision of counsel) as added safeguards against profiteering abuse.

It would also be appropriate for managers and line officers at private prisons to take oaths of office, as most correctional officials do now. Fenton Interview, *supra* note 15; Telephone interview with Mary Woolley, Counsel, House Judiciary Committee, Pennsylvania State Legislature (Jan. 30, 1986). Pennsylvania's enabling legislation, H.307, P.N. 2460 § 7 (Pa. House 1985) does not require oaths of office, although it does designate private correctional staff as "peace officers." Similarly, the New Mexico legislature has explicitly empowered correctional employees to act as peace officers with respect to arrests and law enforcement responsibilities within prisons. N.M. STAT. ANN. § 33-1-10

First, contracts stipulating that government personnel be placed in privatized facilities as monitors or even supervisors[93] might well reduce the possibility of serious managerial abuse, but to the extent that institutional discretion remains in private hands, either in the cellblock or in the boardroom, these safeguards will do little to alleviate the concerns surrounding private delegations.[94] Of course, if supervision or monitoring expands to the point that public personnel are performing the core discretionary functions,[95] the private delegation problem may be solved, but the prison will no longer be a privatized one, or it will be one in which the original quest for profitability and operational flexibility behind the privatization has been entirely foregone.

Second, although the different attitude which the courts have taken toward public and private entities exercising delegated discretionary authority would seem to require that the standards enacted to guide that authority should be different as well, there is currently no principle *mandating* tough contracts since, unless the courts' adherence to a positivist entitle-

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(Cum. Supp. 1986).

Explicit authorization or deputization could greatly increase the legitimacy of prison employees, both in their own minds and in those of inmates, and would also ensure that the state has an interest in closely monitoring prison standards since its liability profile would be heightened; sworn oaths of office or formal deputization would eliminate any doubt about the presence of state action for purposes of prisoners' rights litigation under 42 U.S.C. § 1983 (1982). *Compare* Ancata v. Prison Health Servs., Inc. 769 F.2d 700 (11th Cir. 1985) (county potentially liable for injury resulting from deliberate indifference to medical needs of prisoner by private health care contractor since prison exclusive government prerogative) *and* Langer v. Kendall, 721 F.2d 832 (8th Cir. 1983) (city liable for actions of private doctor hired by city to do autopsies pursuant to state law) *and* Medina v. O'Neill, 589 F.Supp. 1028 (S.D. Tex. 1984) (Immigration and Naturalization Service officials liable for wrongful death of illegal alien killed by negligent private guard) *and* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 172 n.8 (1978) (Stevens, J., dissenting) (maintenance of police force a uniquely governmental function; delegation of this function to private party entails state action) *with* Rendell-Baker v. Kohn, 457 U.S. 830, 841 (1982) ("Acts of . . . private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.") *and* Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974) (§ 1983 claim against private utility rejected since provision of electricity not "traditionally exclusively reserved to the State").

93. Private prison advocates often make this suggestion. Telephone interview with Richard Crane, CCA Vice-President for Legal Affairs (Nov. 23, 1985) [hereinafter Crane Interview]. For a thorough discussion of the monitoring question, see Note, *The Panopticon Revisited: The Problem of Monitoring Private Prisons,* 96 YALE L.J. 353 (1986).

94. Moreover, even assuming that courts will find state action for purposes of § 1983 liability in private prison cases, *see supra* note 92 (citing conflicting authorities); Note, *Section 1983 and the Independent Contractor,* 74 GEO. L.J. 457, 469-79 (1985) (surveying narrowing of "public function" analysis and criticizing legal distinction between independent contractor and public employee), the risk of government liability might prove less an incentive for strict public scrutiny than an encouragement to minimize state monitoring and deputization contacts or to seek such substantial indemnification from the contractor that the enterprise collapses.

95. The fact that no current or proposed statute even remotely approaches this alternative is proof enough of its impracticality. Pennsylvania's privatization bill, the strictest yet proposed, merely licenses inspectors and visitors. H. 307, P.N. 2460 §§ 10-11 (Pa. House 1985). No existing statute envisions any continuous or even regular state presence in privatized facilities; the most frequent inspection provided is biannual. *See* N.M. STAT. ANN. § 33-3-4 (Cum. Supp. 1986) (biannual inspections); PA. STAT. ANN. tit. 61 §§ 31, 460.3(4) (Purdon Supp. 1986) (specifying annual reports, but no frequency of inspection).

ment analysis is shaken, such safeguards are not constitutionally compelled.[96] In light of the expansion in prisoner rights litigation that more comprehensive regulation (and, hence, a more comprehensive set of due process entitlements) is likely to engender,[97] however, state officials will be less than anxious to promulgate strict standards to limit private adjudicative discretion.[98]

Finally, the promulgation of strict contractual standards does not ensure their prompt and effective implementation; much less can it guarantee their continued force several years into the life of the contract, when legislative scrutiny may have weakened and when corporate control of the state's penal system may have reached the point that the government no longer has the expertise, personnel, facilities, or fiscal resources to run the prisons.

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96. For example, though most states have granted inmates the right to an advocate at prison disciplinary hearings, Wolff v. McDonnell, 418 U.S. 539 (1974), does not require such assistance; if a private contractor decided to abandon the state practice, federal law would support him unless his contract specifically constrained him to provide advocates.

In fact, the privatization standards enacted to date provide no more rigorous safeguards than those which already constrain public prison officials, Fenton Interview, *supra* note 15, namely an adherence to the vague guidelines provided by the American Correctional Association, *see* AMERICAN CORRECTIONAL ASS'N, PUBLIC CORRECTIONAL POLICY ON PRIVATE SECTOR INVOLVEMENT IN CORRECTIONS (Ratified Jan. 20, 1985) (privatized services must "meet professional standards, provide necesssary public safety, provide services equal to or better than government, and be cost-effective compared to well-managed governmental operations"), and the minimal prescriptions laid down by the Supreme Court. *See supra* notes 36–37, 41, 42 and accompanying text (discussing current standards).

One grave concern not addressed by the American Correctional Association or by the Court's decisions that warrants attention in private prison contracts is guard training and quality; inadequate staff preparation may give rise to due process claims. Current training of public prison guards is, to be sure, hardly satisfactory, *see* J. JACOBS, *supra* note 9, at 134, but it is nonetheless disturbing that CCA, the largest and best capitalized of the private prison firms, provides its line personnel with a 40-hour training seminar only, Crane Interview, *supra* note 93, and that no state appears to have mandated specific training requirements for the private sector. *But see* Woolley, *Prisons for Profit: Policy Considerations for Public Officials,* 90 DICK. L. REV. 307, 324 (1985) (Pennsylvania privatization legislation would establish mandatory training program for private prison guards).

This failure to mandate requirements is not surprising given that hiring guidelines are often minimal in the public sector, *see, e.g.*, N.M. STAT. ANN. § 33-1-11 (1986) (requiring that correctional officers be citizens, of majority age, of good moral character, possess the equivalent of a high school education and pass physical fitness and aptitude examinations), and that training for the public prison guard is, as one leading commentator has put it, "the exception rather than the rule." J. JACOBS, *supra* note 9, at 134.

97. *See* J. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 9 & nn.22–23 (1985) (citing 350% increase in federal procedural due process claims from 1960's to 1970's; tracing this "explosion" to Supreme Court's characterization of welfare benefits as more entitlement than "gratuity" and requirement of procedural due process before termination); *see also* J. JACOBS, *supra* note 9, at 41 (noting 451.5% increase in prisoners' rights petitions filed in federal district courts between 1970 and 1979).

98. *See* Note, *supra* note 24, at 1022–23 (noting disincentives for administrators and legislators to enact such standards).

V. The Judicial Role in Private Prisons: Escaping the Positivist Trap

The inability of contractual standards to safeguard inmates' rights adequately in privatized prisons, combined with the financial bias of prison firms and the sensitivity of the rights involved, places the courts in a crucial regulatory role. First and foremost, the Supreme Court should, in the private prison context, reconsider its positivist approach to due process rights.[99] Continued judicial reluctance to second-guess the judgments of prison staff would ignore the danger that private prison operators will act more abusively and arbitrarily than public officials. Leaving the creation and adjudication of entitlements to profit-seeking entities without close scrutiny cannot be equated with delegating these powers to public agencies. Privatization without retention of adequate control is inconsistent with the Court's own jurisprudence since an extension of positivism to private prisons would directly contradict the consistent suspicion of the Court toward for-profit delegations.

A reasoned application of nondelegation jurisprudence does not require a ban on prison privatization, since the Court's holdings do not derive from an Article I doctrine of per se invalidity.[100] It does, however, require heightened judicial scrutiny where matters of great concern to the state and interests protected by the Fourteenth Amendment are being handed over to private enterprise for the first time.

Such scrutiny must reflect a recognition that, regardless of the extent to which they are designated as public officials, private prison personnel will remain private employees.[101] Courts must therefore mandate not only considerably higher standards, but substantially less deferential review as well.[102] Measuring compliance with judicial decrees will be problem-

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99. The term "positivist trap" is Professor Jerry Mashaw's. Mashaw, *Due Process: The Quest for a Dignitary Theory*, 61 B.U.L. Rev. 885 (1981) (referring to view that Constitution can permit government to define interests with no safeguards against arbitrary discretion and yet not permit government to define interests with only limited safeguards). *See supra* note 24 and accompanying text.

100. This is not to say that some state courts might not apply a rule of facial invalidity to private prisons, *see supra* note 56 and accompanying text, but merely to argue that, in this context, a dismantling of positivist prison jurisprudence would better accord with the due process/nondelegation principle as it has evolved in the modern administrative state. Moreover, even were a wholesale ban warranted by earlier decisions, the political difficulty of implementing such a ban, *see supra* note 13, combined with the Court's natural tendency to rule narrowly and on a case-by-case basis, would make a tough, non-deferential approach more practicable.

101. If prison personnel remain on the government payroll though under private corporate management, as they do at the Butler County Jail, Fenton Interview, *supra* note 15, they nonetheless operate under the supervision of a for-profit, rather than a nonprofit, entity. At the least, the stricter standard of review proposed herein should apply in such instances to the discretionary activities of the facility's management, few of which would be separable from the activities of line personnel.

102. It might be objected that a more intense standard of review for private prisons would violate the equal protection rights of inmates in state-run facilities; prisoners might be treated better by jailers

atic.[103] Nonetheless, an explicit merger of due process and nondelegation doctrines, long practiced by the courts in regard to other private delegations, combined with judicial willingness to intervene in prisons, could prevent privatization from worsening an already calamitous correctional system.[104]

Abusive and arbitrary treatment, of course, is not limited to the extreme and highly unlikely depredations of enslavement and corporal punishment. Courts should be especially alert for more subtle deprivations, such as improper revocation of good time, unwarranted tightening of internal disciplinary and parole hearing procedures, arbitrary imposition of administrative segregation and transfer, and increases in searches and seizures, all of which might seem rational and efficient to private contractors.

Rigorous judicial scrutiny may either undermine the truly private nature of these facilities or undercut the economic advantages of privatization by imposing prohibitively expensive constitutional requirements on contractors. However, efficiency gains must not come at the expense of process rights. If they do, then legislators and corrections officials will have strong evidence that prison privatization was not the panacea it was initially advertised to be.

Second, even if the Court refuses to qualify its approach in this new area, it should be especially ready to invoke the "last resort" safeguards of the First and Eighth Amendments. The recent trend away from "hands-

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who know that their facility is being closely scrutinized. However, such an objection mistakes an instrumental difference for a substantive one; as Hansmann's "distribution constraint" (*see supra* notes 82–83) illustrates, heightened vigilance is required just to ensure that private, for-profit prisons are as scrupulous as (not necessarily more scrupulous than) public ones. A harder judicial look at private facilities would, therefore, constitute not special, but merely ameliorative, treatment.

It may be that the fall of positivism in this context would lead inexorably to the conclusion that positivism in the public prison context must be discarded as well. Such a conclusion, however, is not necessary to prove the point that positivism should be abandoned in the more limited area of private, for-profit delegations. A rejection of deference in prison law as a whole would derive not from due process-driven principles affecting private delegations but from objections to the wide discretion exercised by public prison staff. *See supra* notes 34–43 and accompanying text.

103. *See* J. JACOBS, *supra* note 9, at 49, 53 (citing "ambiguity" of declaratory judgments, consent decrees, and injunctions in prison cases and noting that courts may retain jurisdiction for several years); AFTER DECISION, *supra* note 5, at 113–14 (noting that, although *Holt* litigation wrought "broad and profound" changes in Arkansas prison system, conditions still remained "less than ideal").

104. Prolonged litigation, especially in Arkansas and Texas, has demonstrated the power of determined courts to oversee and implement prison reform. *See* Ruiz v. McCotter, No. H-78-987-CA (S.D. Tex. Dec. 31, 1986) (federal judge holds state in contempt for violation of previous court decrees; orders extensive reforms and improvements and submissions of detailed plans for compliance by April 1, 1987 on pain of compounding fines); Press, *Inside America's Toughest Prison*, TIME, Oct. 6, 1986, at 46, 50-52, 58-60 (discussing perseverance of federal judge in prison reform); cases cited *supra* note 19. In this endeavor, the appointment of special masters might well prove useful. *See* Note, *"Mastering" Intervention in Prisons*, 88 YALE L.J. 1062, 1088–91 (1979) (offering suggestions for enhancing effectiveness of masters in prison setting); *see also* Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 30–35, 52–55 (1979) (noting unique ability and authority of courts in structural reform litigation).

on" adjudication in conditions of confinement cases,[105] unfortunate enough in the public sector, should certainly not extend to cases arising in the private sector. An unwillingness to afford stricter process scrutiny need not preclude heightened vigilance with regard to these other, and even more fundamental, rights.

Third, the Court should insist that the state maintain control over adjudicative discretion—that any de facto adjudications performed by private, for-profit entities be carefully limited and constantly reviewed. This might involve the creation of an ombudsman with sufficient staff and resources to implement guidelines that the courts and the legislature devise for key discretionary functions, such as administrative segregation, disciplinary hearings, good time and parole revocation, search and seizure, transfer, and security classification.[106] Moreover, prisoners' rights advocacy organizations and other public interest groups should participate in review and oversight. Their watchdog role will be more important in private prisons since any relaxation in the vigilance of the courts or the political branches could have grave consequences for private prison inmates and since the state has clear disincentives for bringing cases which, under the state action doctrine,[107] are really against itself.

Fourth, to ensure that private regulation will be interstitial only, the courts should insist that basic rulemaking be done only by appropriate governmental entities. Fifth, as an added incentive for contractors to maintain adequate standards and safeguard prisoners' rights, the Supreme Court should refrain from extending to private prisons its recent holdings that preclude government liability for inmate harms caused by mere negligence.[108] As Justice Blackmun noted in dissenting from this new doctrine, in some endeavors, and especially in prison management, governmental negligence can be an abuse of power implicating due process rights.[109] This is especially true in privatized prisons, where profit-seeking creates still greater potential for abuse. Absent such a reversal, however, *state* law should expressly provide for liability of private guards in cases of mere negligence. Finally, whatever doctrinal course the Supreme Court steers in the area of prison law, the state courts should not abandon the more

105. *See supra* note 21.

106. Correctional ombudsmen have long proved successful in safeguarding prisoners' rights in several Scandinavian countries and, more recently, have been appointed in a number of American jurisdictions as well. G. HAWKINS, *supra* note 40, at 151, 155–56. *See also* W. GELLHORN, OMBUDSMEN AND OTHERS 147–51 (1966) (describing instances in which ombudsmen useful in reconciling "disciplinary demands and inmates' interests"). An added virtue of a correctional ombudsman would be his ability to relieve courts of many of their prison-monitoring duties. G. HAWKINS, *supra* note 40, at 153.

107. *See supra* notes 92, 98.

108. Davidson v. Cannon, 106 S. Ct. 668 (1986); Daniels v. Williams, 106 S. Ct. 662 (1986).

109. *Davidson*, 106 S. Ct. at 672–74 (1986) (Blackmun, J., dissenting).

rigorous nondelegation standards they have long held,[110] and should find prison privatization the ripest ground yet for invoking their traditional concern over delegations to private, for-profit entities.

VI. Conclusion

This Note does not dispute the poor state of American prisons today; nor does it deny the potential utility of privatizing secondary services within those prisons. At a minimum, however, if government abandons direct day-to-day control of core discretionary functions, strict contractual guidelines must be established and the deferential standard of judicial review must be altered to provide for more intense scrutiny. These reforms may eliminate the economic advantages that have impelled the privatization campaign. Cost concerns, however, cannot be allowed to transcend the state's duty to provide for those whom it has felt necessary to remove from society. "The Constitution," as the Court noted in *Stanley v. Illinois*, "recognizes higher values than speed and efficiency."[111]

110. *See supra* notes 56, 66 and accompanying text.
111. 405 U.S. 645, 656 (1971).